Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Customs and Patent Appeals and the United States Court of International Trade

Vol. 16 SEPTEMBER 29, 1982 No. 39

This issue contains

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

The abstracts, rulings, and notices which are issued weekly by the U.S. Customs Service are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Logistics Management Division, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

U.S. Customs Service

Treasury Decisions

(19 CFR Part 113)

(T.D. 82-164)

Customs Regulations Amendments Relating to the Immediate Delivery and Consumption Entry Bond (Term) Customs Form 7553

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: The Customs Regulations provide that the Immediate Delivery and Consumption Entry Bond (Term), Customs Form 7553, required to be filed by importers to protect the revenue of the United States or to ensure compliance with applicable laws and regulations, shall be in the amount of $10,000, or such larger amount as the district director may deem necessary. Based on this regulation, the bond is often fixed in an amount equal to the value of the imported merchandise plus estimated duties and taxes compiled from the entries of an importer during the previous year. The fixing of the amount of the term bond in such a rigid manner may result in a financial hardship on some importers because they are often required to file term bonds in amounts that are unnecessarily high. To ensure that Customs fixes the amount of the term bond sufficient to protect the revenue, while at the same time not imposing an unnecessary financial burden on the importer, this document amends the regulations to provide that the term bond shall be in the amount of $10,000, or such larger amount as the district director may deem necessary to accomplish the purpose for which the bond is given. Guidelines are set forth to assist district directors in setting the amount of the term bond.

EFFECTIVE DATE: October 13, 1982.

FOR FURTHER INFORMATION CONTACT: Legal aspects: William Rosoff, Carriers, Drawback and Bonds Division (202-566-5856); Operational aspects: Herb Geller; Duty Assessment Division, (202-566-5307); U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

BACKGROUND

To protect the revenue of the United States or to ensure compliance with any pertinent law, regulation, or instruction, Customs bonds or other security are required by law in many instances, and may be authorized by regulation or specific instructions in other instances (section 623, Tariff Act of 1930, as amended (19 U.S.C. 1623)). Part 113, Customs Regulations (19 CFR Part 113), sets forth the procedures and requirements relating to Customs bonds.

Section 113.2, Customs Regulations, provides that whenever a bond is required or authorized by law, regulations, or instructions, the Commissioner of Customs may:

1. Prescribe the conditions and form of such bond, and fix the amount of penalty, whether for the payment of liquidated damages, or of a penal sum, except as otherwise specifically provided for by law;

2. Provide for the approval of sureties on the bond, without regard to any general provisions of law;

3. Authorize the execution of a term bond the conditions of which extend to and cover similar cases of importations over a period of time, not to exceed one year or such longer period as he may fix; and

4. Authorize the taking of a consolidated bond (single entry or term) in place of separate bonds to assure compliance with two or more provisions of law, regulations, or instructions.

Customs bonds may be approved by the Commissioner of Customs or a district director of Customs. Bonds approved by the Commissioner are described in section 113.13, Customs Regulations, and bonds approved by a district director are described in section 113.14, Customs Regulations.

Section 113.14(g)(2), Customs Regulations, provides that the Immediate Delivery and Consumption Entry Bond (Term), Customs Form 7553, shall be in the amount of $10,000, or such larger amount as the district director may deem necessary. This bond shall be taken to cover only entries to be made at a single port and shall not be modified to cover more than one port. The last sentence of this section provides that the rules under section 113.14(g)(1) for determining the amount of the single entry immediate delivery and consumption entry bond shall be applied in making charges against immediate delivery and consumption entry term bonds.

Customs believes that the reference in the last sentence of section 113.14(g)(2) to "paragraph (g)(1)" is in error. Paragraph (g)(1) refers to the entire section dealing with the single entry bond amount. Historically, section 113.14(g)(2) contained a cross reference to section 113.14(g)(1)(iii), which concerns a single entry bond

covering unconditionally free merchandise. The inconsistency in the regulations may be a cause of some problems.

In determining the dollar amount of the term bond, Customs Form 7553, district directors often fix the amount of the bond equal to the value of the merchandise imported plus estimated duties and taxes compiled from the entries of each importer during the previous year.

The fixing of the amount of the bond in such a rigid manner may result in hardships on some importers. They are often required to file term bonds in amounts that are unnecessarily high when Customs is concerned primarily with guaranteeing payment *only* of supplemental duties (increased or additional duties ascertained upon liquidation).

In the case of merchandise released under the entry documentation listed in section 142.3, Customs Regulations (19 CFR 142.3), before filing the entry summary, estimated duties generally are deposited when the entry summary is filed, *i.e.,* within 10 days after the time of entry. For merchandise released under a special permit for immediate delivery under section 142.21, Customs Regulations (19 CFR 142.21), estimated duties generally are deposited when the applicable documentation is filed, *i.e.,* within 10 days after the merchandise is authorized for release.

Furthermore, in the case of quota class merchandise on which estimated duty is deposited before release, it does not appear necessary for the protection of the revenue to use the amount of any duty that is to be deposited before release of the merchandise in fixing the term bond amount.

Because (1) estimated duties generally are deposited within 10 days after release of the merchandise, and (2) entries often are liquidated during the course of a year unchanged, thereby reducing the liability for payment of supplemental duties which would have been charged against the term bond for those entries, Customs often is concerned primarily with securing payment only of any supplemental duties ascertained upon liquidation. Therefore, it is desirable for district directors to fix the amount of the term bond in a more meaningful manner.

By way of comparison, section 113.14(s), Customs Regulations, provides that a general term bond for entry of merchandise, Customs Form 7595, shall be in the amount of $100,000, or such larger amount as may be fixed by the district director. However, Customs guidelines provide that the district director, in approving a bond on Customs Form 7595, fix the amount in the multiple of $100,000 nearest to 10 percent of the duties and taxes paid during the calendar year preceding the date of importation. Customs believes that in fixing the amount of a term bond, the amount so determined should be sufficient to accomplish the primary purpose of that bond, *i.e.,* to guarantee payment of duty and taxes due.

In this regard, on February 19, 1982, Customs published a notice in the Federal Register (47 FR 7456), proposing guidelines to be used in fixing the amount of a term bond, Customs Form 7553, in a manner similar to that used for a general term bond, Customs Form 7595. To eliminate an unintended burden on the importing community, and to ensure that the district director fix a more meaningful amount for the term bond, it was proposed that section 113.14(g)(2) be amended by adding the words "to accomplish the purpose for which the bond is given" to the end of the first sentence. The purpose of the additional language is to ensure that Customs fix the dollar amount of the term bond sufficient to protect the revenue of the United States, while at the same time not imposing an unnecessary burden on the importer.

It was also proposed to delete the last sentence of section 113.14(g)(2), because it is misleading and is subject to improper interpretation.

Pursuant to the notice, interested parties were given until April 20, 1982, to submit comments on the proposal. After review of the seven comments received, Customs has determined to adopt the amendments and the guidelines for term bonds as proposed.

Discussion of Comments

Four commenters expressed support for the proposed rule. They indicated it would reduce hardships for importers who file bonds in extremely large amounts.

Two commenters also support the proposal, but suggest the use of the term bond on a district basis rather than on the current port basis. Another commenter makes several suggestions relating to standardizing forms, uniformity of information supplied on the forms, and applications for general term bonds. These suggestions go beyond the scope of the proposal and, therefore, cannot be adopted at this time. However, they are being considered as part of a project to modernize processing and procedures for bond related transactions.

E.O. 12291

This document does not meet the criteria for a "major rule" as specified in section 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

Regulatory Flexibility Act

Pursuant to the provisions of section 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)), it is hereby certified that the rule will not have a significant economic impact on a substantial number of small entities.

Guidelines For Term Bond

A district director, in approving a term bond, Customs Form 7553, should fix the amount in the multiple of $10,000 nearest to 10 percent of the duties and taxes paid by an importer during the previous calendar year. If no imports were made during the preceding calendar year, the amount of the bond shall be in the multiple of $10,000 nearest to 10 percent of the duties and taxes which the applicant estimates will accrue on imports during the current year. In no event shall the amount of the bond be less than $10,000.

Drafting Information

The principal author of this document was Charles D. Ressin, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

List of Subjects in 19 CFR

PART 113

Customs duties and inspection, imports, surety bonds.

Amendments to the Regulations

Part 113, Customs Regulations (19 CFR Part 113), is amended as set forth below.

William von Raab,
Commissioner of Customs.

Approved: August 30, 1982.
John M. Walker, Jr.,
Assistant Secretary of the Treasury.

PART 113—CUSTOMS BONDS

Section 113.14(g)(2), Customs Regulations (19 CFR 113.14(g)(2)), is revised to read as follows:

§ 113.14 Bonds approved by the district director.

* * * * * * *

(g) *Immediate Delivery and Consumption Entry Bond.*
(1) * * *

(2) *Term bonds, Customs Form 7553.* Immediate Delivery and Consumption Entry Bond (Term), Customs Form 7553, in the amount of $10,000, or such larger amount as the district director may deem necessary to accomplish the purpose for which the bond is given. This bond shall be taken to cover only entries to be made at a single port and shall not be modified to cover more than one port.

(R.S. 251, as amended, secs. 623, 624, 46 Stat. 759, as amended (19 U.S.C. 66, 1623, 1624))

[Published in the Federal Register, September 13, 1982 (47 FR 40163)]

(T.D. 82-165)

Generalized System of Preferences; Evidence of the Country of Origin

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: For all shipments of imported merchandise valued in excess of $250, a claim for an exemption from duty under the Generalized System of Preferences ("GSP"), must be supported by the production of a GSP Certificate of Origin Form A.

This document amends the Customs Regulations by giving the district directors of Customs discretion to waive production of the Form A as evidence of the country of origin in all cases when the district director is satisfied that the articles qualify for duty-free entry under GSP. This amendment removes the burden from importers of acquiring a Form A from foreign governments when, through no fault of the importer, one cannot be obtained and the merchandise qualifies for duty-free treatment in all other aspects.

EFFECTIVE DATE: September 13, 1982 for entries made, or withdrawals from warehouse for consumption, on or after that date.

FOR FURTHER INFORMATION CONTACT: Legal Aspects: Benjamin Mahoney, Entry Procedures and Penalties Division (202-566-5765); Operational Aspects: Fred McGreevy, Duty Assessment Division (202-566-2957).

SUPPLEMENTARY INFORMATION:

Background

Title V of the Trade Act of 1972 (19 U.S.C. 2461-2465) (the "Trade Act"), authorizes the President to establish a Generalized System of Preferences (GSP) to provide duty-free entry for eligible articles arriving directly from designated "beneficiary developing countries." Section 503(b) of the Trade Act (19 U.S.C. 2463(b)), relating to the requirements which must be met for eligible articles to receive duty-free treatment, authorizes the Secretary of the Treasury to prescribe such regulations as may be necessary to carry out the provisions of that subsection. Sections 10.171 through 10.178, Customs Regulations (19 CFR 10.171-10.178), set forth the requirements and procedures for the entry of eligible merchandise from "beneficiary developing countries" under GSP.

On January 14, 1982, Customs published in the Federal Register (47 FR 2124) a document proposing to amend section 10.173(a), Cus-

toms Regulations (19 CFR 10.178(a)), to give the district director the discretion to waive production of the Form A for entries of imported merchandise, when he is satisfied that the merchandise qualifies for duty-free entry under GSP. The purpose of the proposed change was to remove the regulatory burden from importers of acquiring a Form A from foreign governments when, through no fault of their own, one cannot be obtained, and the merchandise qualified for duty-free treatment in all other aspects. This would be of benefit to the importing public in that a significant amount of money spent in communicating back and forth between the United States and foreign countries would be saved. The proposal also would benefit Customs by eliminating the need for withholding appraisement on relatively insignificant shipments; the considerable time spent in the process of filing GSP entries; the charging of bonds for missing documents (namely the Form A); and the follow-up process relating to the production of the missing documents.

It also was proposed to remove section 10.173(a)(5)(ii), which is obsolete.

Analysis of Comments

A Total of 48 comments were received in response to the notice of proposed rulemaking, 44 of which favored the proposal. In addition to the reasons advanced by Customs for adopting the proposal, those commenters suggested others, such as laws in a beneficiary developing country ("BDC") regarding country of origin, which are arbitrary and prevent a BDC from issuing a Form A when the article involved is qualified under U.S. law. For example, Customs was informed that a number of BDC countries will not issue another Form A, even though the original one was clearly lost. These situations would be relieved by the adoption of the proposal. Many of the commenters who favored the proposal generally, also made other recommendations as noted below.

Four commenters suggested that Customs eliminate the Form A requirement entirely. In addition, at least five other commenters seemed to interpret the proposal as providing authority for the district director to waive the Form A requirement totally. Although the proposed regulation was not intended to have been so interpreted, it is pointed out again in the preamble of this regulatory amendment that the proposed change would remove the regulatory burden from importers of acquiring a Form A from foreign governments when, through no fault of their own, one cannot obtain the Form A and the article is GSP-qualified. The Form A is essential because it is an official certification by the BDC as to the product's country of origin and sets forth certain other valuable information, such as the value percentage, which is helpful in determining if the product qualifies for GSP treatment. For that reason, Customs does not believe the elimination of such requirement would be beneficial. However, at the same time, when Customs at the port of entry

385-177 O - 82 - 2

recognizes, due to the nature of the product, previous history of importation, or for a variety of other reasons, that the product involved does qualify, we believe that it would be contrary to the spirit of the GSP program to deny the duty-free entry of such merchandise where the importer has demonstrated to Customs that he has attempted unsuccessfully to obtain the Form A. Of course, if there is any question as to whether such product would qualify, a Form A would be required.

Three commenters suggested that the district director be permitted to waive the Form A based on such considerations as the nature of the product, the importer's past history, *etc.*, without requiring that the importer in these circumstances attempt to obtain the Form A. Customs agrees, and will consider this comment further when guidelines are issued, as discussed below.

Two commenters believe that in those situations where the waiver applies, the district director should be *required* to waive the Form A. They suggest that the word "may" in the proposed regulation be changed to "shall". Customs believes that there may be certain considerations, such as the percentage of value, regarding a certain product whereby the district director would not wish to waive the Form A on that product. Thus, Customs believes that the waiver should remain discretionary, rather than mandatory.

Ten commenters believe that the proposal should be applied retroactively. One suggested that the proposal be applied to all entries which are unliquidated, under protest, or before a court. Two others suggested that the proposal be applied to all entries which are unliquidated. Seven commenters request that the proposal, if adopted, be retroactive to January 1, 1982, and another suggested December 15, 1981. It is Customs policy that amendments to the Customs Regulations should be made prospective in nature, rather than retroactive. Accordingly, those suggestions have not been adopted, and this rule has been made applicable only to those entries of merchandise made, or merchandise withdrawn from warehouse for consumption, on or after the effective date of this amendment.

Four commenters contend that the proposal should contain guidelines as to when the district director may waive a Form A. Although Customs recognizes that this suggestion has merit, we prefer to issue guidelines to Customs officers and the importing public through directives, rather than regulations. However, examples of when a district director may waive a Form A would be (1) if the BDC country refuses to issue a Form A because the product is not considered by its law to be from that country, yet under U.S. law, the country of origin would be the BDC country, or (2) if the BDC country refuses to issue another Form A and the district director is satisfied that the one originally issued is lost.

Two commenters noted that the proposed regulations do not indicate the acceptable documentary evidence necessary for the import-

er to submit to satisfy the district director so that he may waive the production of the Form A. The type of documentary evidence would vary according to the type of commodity. For certain agricultural products, such as fruit imported from a contiguous country, a commercial invoice and other supporting documentary evidence such as a bill of lading and letters of credit might be sufficient, whereas for a manufactured product, more detailed documentation regarding the manufacturing process might be needed.

Ten commenters, who are importers of produce from a particular BDC country, noted that for certain agricultural commodities, such as watermelons, the BDC country has delegated the issuing of the Form A to a private organization (the farmer's union). This private organization has been charging American importers 50% of what U.S. duty charge would have been, to issue Form A's. Customs believes that the charge to issue the Form A is unjustified, and is tantamount to the situation where the importer is unable to obtain the Form A from the BDC government.

One commenter believes that the Form A requirement should be waived for first-time importers because of their inexperience in importing goods. However, Customs notes it may be difficult in some cases to determine if someone is a first-time importer. Furthermore, it is Customs position that one in the business of importing should be aware of Customs and other requirements.

Two commenters suggested that once an importer's duty-free entry of a product under GSP has been approved by Customs, that importer should be able to import the product under that Form A for a given period of time. Customs believes that since GSP is a privilege, an importer has the burden of establishing for each shipment that the merchandise qualifies for duty-free treatment under GSP.

One commenter suggested that the district director should not have discretion to waive production of the Form A when the merchandise in question is valued in excess of $1,000. Due to the number of commercial shipments valued over $1,000, Customs believes that such a restriction would obviate much of the benfit of the proposal in facilitating commerce, and thus is not justified in this instance.

One commenter suggested that the concept of "imported directly" as set forth in section 10.175(b), Customs Regulations (19 CFR 10.175(b)), should be expanded to provide that as long as the goods are wholly-grown or produced in the BDC country and do not enter the commerce of an intermediary country, such article is eligible for GSP duty-free exemption. Customs considers this suggestion to be clearly beyond the scope of the proposal.

One of the four commenters in opposition to the proposal noted that to qualify for GSP, the merchandise involved must be the growth, manufacture, or product of the BDC country, and that at least 35% of the value of the product must be produced in that

BDC country. This commenter noted that the Form A requirement is a certification from the BDC country that those two important conditions have been met and furthermore, this requirement is an important safeguard that the GSP criteria has been complied with. Customs notes that the waiver of the GSP requirement is essentially limited to situations in which the importer has satisfied the district director that he has attempted to obtain the required Form A. Even if the importer has unsuccessfully attempted to obtain the Form A, the district director would not waive the production of this document unless satisfied, based upon previous importation that the documentation submitted (*e.g.,* the commercial invoice or bill of lading), and other evidence establishes that the merchandise is from the claimed country. Furthermore, although convinced of the above, the district director would not waive the production of the Form A if there is any question regarding the value contribution of the BDC country. In conclusion, Customs believes that the waiver of the production of the Form A under such limited circumstances would not result in the entry of unqualified merchandise as GSP merchandise.

Another commenter contended that the proposed waiver of the Form A by the district director would enable transshipped merchandise (merchandise which arrived directly in the United States from a BDC country, but was originally a product of an unqualified country and was subsequently shipped to the BDC country) to receive the GSP benefit erroneously. The commenter asserted that the certificate of origin (Form A) is a safeguard regarding the country of origin. As noted above, the waiver of the Form A will be granted by the district director only under certain limited circumstances. Therefore, Customs does not envision unqualified merchandise being entered duty-free under GSP as a result.

The same commenter further suggested that a number of importers will ship their merchandise to ports of entry where the district directors will be more disposed to waive the Form A requirement. In this view, this commenter and another commenter contended that the waiver of the Form A requirement will result in non-uniformity. As noted above, guidelines will be issued to Customs field officers which will promote uniformity. Furthermore, Customs does not expect that it would be to any advantage for an importer to ship his merchandise through a port other than the normal port of entry. On the contrary, Customs believes that a district director who is unfamiliar with the importer and unfamiliar with the product involved would be less inclined to waive the Form A requirement, than a district director who was familiar with the product and the past history of the importer.

A third commenter opposed to the proposal noted that American businesses which export their merchandise abroad find that they are subject to "red tape" by the foreign country, including certain foreign customs requirements. This commenter suggested that

before this more liberalized regulation is adopted, the United States should receive like treatment from the foreign countries involved and that this should be done on a reciprocal basis. Customs believes that after the importer has done all he can to obtain the Form A and the district director is satisfied that the merchandise qualifies, it would be contrary to the spirit or the purpose of the GSP to deny such a claim for free entry.

Another commenter noted that the waiver of the Form A requirement would hinder an exporting country's attempt to monitor its exports. While Customs recognizes that adoption of the proposal may adversely affect the statistical monitoring ability of a BDC country of its GSP exports, Customs believes the GSP privilege should not be denied an importer of merchandise that is otherwise eligible for that privilege but for the non-production of the Form A.

Accordingly, based upon the comments received in response to the notice of proposed rulemaking and Customs further consideration of the matter, it has been determined to adopt the proposal as it appeared in the January 14, 1982, notice document.

Inapplicability of Delayed Effective Date

Because the amendment to the Customs Regulations is a substantive rule which grants an exemption, Customs has dispensed with a delayed effective date pursuant to 5 U.S.C. 553(d)(1).

Regulatory Flexibility Act

Pursuant to the provisions of section 3 of the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601, *et seq.*), it is hereby certified that the rule set forth in this document will not have a significant economic impact on a substantial number of small entities. Accordingly, this regulation is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

Executive Order 12291

This document does not meet the criteria for a "major rule" as specified in section 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

Drafting Information

The principal author of this document was Todd J. Schneider, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

List of Subjects In 19 CFR Part 10

Customs duties and inspection, Generalized System of Preferences, imports.

AMENDMENT TO THE REGULATIONS

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

Section 10.173(a)(5), Customs Regulations (19 CFR 10.173(a)(5)), is revised to read as follows:

§ 10.173 Evidence of the country of origin.

(a) *Shipments valued in excess of $250.* * * *

(5) *Waiver of Certificate of Origin.*

The district director may waive production of a Certificate of Origin when he is otherwise satisfied that the merchandise qualifies for duty-free entry under the Generalized System of Preferences.

* * * * * * *

(R. S. 251, as amended, section 624, 46 Stat. 759, section 503(b), 88 Stat. 2069, as amended (19 U.S.C. 66, 1624, 2463(b)).

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: August 30, 1982.
JOHN M. WALKER, Jr.,
Assistant Secretary of the Treasury.

[Published in the Federal Register, September 13, 1982 (47 FR 40160]

(T.D. 82-166)

Extension of Huntsville, Alabama, Port of Entry Designation

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of Extension of Port of Entry Designation.

SUMMARY: This document extends, until July 30, 1983, the period of time for which the Huntsville, Alabama, Customs port of entry is established on an experimental basis. Huntsville was established as a port of entry in 1980 on a 2-year experimental basis. This 1-year extension is being granted in order to make a full and fair assessment as to whether Huntsville can meet the criteria for establishing and staffing a port of entry.

EFFECTIVE DATE: July 30, 1982.

FOR FURTHER INFORMATION CONTACT: Richard C. Coleman, Office of Inspection, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8157).

SUPPLEMENTARY INFORMATION:

BACKGROUND

As part of a continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the public, by a document published in the Federal Register on July 1, 1980, as T.D. 80–176 (45 FR 44263), effective July 30, 1980, Huntsville, Alabama, was designated as a Customs port of entry in the Mobile, Alabama, Customs district, on a 2-year experimental basis. That document provided that at the conclusion of the 2-year period, Customs would evaluate the amount of international business, the continued need for Customs services in the area, and the adequacy of Customs facilities.

At present, the port of Huntsville has not met the workload criteria for establishing and staffing a port of entry. However, Customs believes that in order to make a full and fair assessment of the viability of Huntsville as a port, a 1-year extension of its designation should be granted.

EVALUATION AT END OF 1-YEAR PERIOD

At the conclusion of the 1-year extension period, Customs will reevaluate the amount of international business, the continued need for Customs services, and the adequacy of Customs facilities at Huntsville. At that time, based upon these reevaluations, Customs will either establish Huntsville as a permanent port of entry or revoke its temporary designation.

AUTHORITY

Customs ports of entry are established under the authority vested in the President by section 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2), and delegated to the Secretary of the Treasury by Executive Order No. 10289, September 17, 1951 (3 CFR, 1949–1953 Comp., Ch. II), and pursuant to authority provided by Treasury Department Order No. 101–5 (47 FR 2449).

DRAFTING INFORMATION

The principal author of this document was Gerard J. O'Brien, Jr., Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

Dated: August 30, 1982.

JOHN M. WALKER, Jr.,
Assistant Secretary of the Treasury.

[Published in the Federal Register, September 13, 1982 (47 FR 40163)]

(T.D. 82-167)

Bonds

Approval and Discontinuance of Consolidated Aircraft Bonds (Air Carrier Blanket Bonds), Customs Form 7605

The following consolidated aircraft bonds have been approved or discontinued as shown below. The symbol "D" indicates that the bond previously outstanding has been discontinued on the month, day, and year represented by the figures which follow. "PB" refers to a previous bond, dated as represented by the figures in parentheses immediately following, which has been discontinued. If the previous bond was in the name of a different company or if the surety was different, the information is shown in a footnote at the end of the list.

Dated: September 8, 1982.

Name of principal and surety	Date term commences	Date of approval	Filed with district director/area director/amount
Air Wisconsin, Inc., Outagamie Airport, Appleton, WI; Safeco Ins. Co. of America[1]	Aug. 10, 1982	Aug. 18, 1982	Chicago, IL $100,000
World Airways, Oakland Int'l Airport, Oakland, CA; Fireman's Fund Ins. Co. (PB 4/25/69) D 8/23/82[1,2]	July 21, 1982	Aug. 23, 1982	San Francisco, CA $100,000

[1] The foregoing principal has been designated as a carrier of bonded merchandise.
[2] Principal is World Airways, Inc.; Surety is Ins. Co. of North America.

BON-3-01

MARILYN G. MORRISON,
Director,
Carriers, Drawback and Bonds Division.

U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., September 10, 1982.

The following are decisions made by the United States Customs Service where the issues involved are of sufficient interest or importance to warrant publication in the Customs Bulletin.

JOHN R. SIMPSON,
Director,
Office of Regulations and Rulings.

(C.S.D. 82-121)

Subject: Transaction Value: This decision holds that escalation payments determined by a formula which was arrived at prior to importation should be taken into account in calculating transaction value

Date: March 15, 1982
File: CLA-2 CO:R:CV:V
542671 CW

DEAR (NAME): This is in response to your letter of November 13, 1981, in which you request a binding ruling in regard to the proper method of appraising certain hydroelectric generators manufactured and to be imported by your client, (name) ————————.

The factual situation giving rise to your request can be summarized briefly as follows: your client sold the generators in question to the (name) ———————— pursuant to a contract which provides for a specific C.I.F., duty-paid, installed price. The purchase price includes amounts for assembling and installing the generators after their importation into the United States. Escalation provisions contained in the contract set forth a formula which allows the amount of escalation to be determined from certain indices when they are published or are compiled by the Bureau of Labor Statistics, Department of Labor. The escalation amounts are calculated monthly in proportion to the work performed and invoiced, although the contract limits the amount of escalation allow-

385-177 O - 82 - 3

able monthly to 80 percent of the calculated adjustment. Payments to your client of up to 90 percent of the value of each generator are to be made monthly or at a mutually agreeable time based on work performed. Of the 10 percent of the contract price which is withheld, 5 percent is payable upon satisfactory delivery of each complete generator and the last 5 percent is payable when the generator is installed and accepted.

You specifically request a ruling that transaction value under section 402(b) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (TAA), is the proper basis of appraisement for the merchandise. You suggest that transaction value should be represented by the contract price plus escalation amounts attributable to that portion of the contract price which is dutiable, less non-dutiable charges, such as installation and assembly in the United States, duty and United States freight. You ask that we permit liquidation of the entries covering these shipments to be withheld for a sufficient amount of time after the final shipment to allow a final and precise determination of the amount of escalation payments. In this regard, you note that since the total amount of escalation payments may not be known for over one year after the dates of entry of the imported generators, it may be necessary to obtain an extension of the one-year period within which entries must be liquidated. Finally, you point out that some of the importations will contain components of United States origin which are entitled to the exemption from duty provided for in item 807.00, TSUS.

As you know, transaction value, the primary or preferred basis of appraisement under the TAA, is defined in section 402(b) as the price actually paid or payable for the merchandise when sold for exportation to the United States, plus amounts for the five items specified in section 402(b)(1). In our view, nothing in the information you have provided us would necessarily preclude the use of transaction value in appraising the hydroelectric generators in question. With respect to the dutiability of that portion of the purchase price which relates to, and is separately identified in the contract as, assembly and installation charges in the United States, United States freight charges, and Customs duties, section 402(b)(3) specifically provides that such charges are not included in transaction value if identified separately from the price actually paid or payable. Thus, these amounts would not be included in the price paid or payable.

Concerning the escalation provisions in the contract, it is our opinion that where, as here, the formula for determining the escalation amounts was arrived at prior to the importation of the merchandise, the escalation payments attributable to the dutiable portions of the contract price should be taken into account in calculating the price paid or payable. This is true even though the final and precise determination of the escalation amounts will not be

known until some time after the final shipment has arrived. Of course, as you point out, 19 U.S.C. 1504(a) provides for a one-year limitation on the time within which to withhold liquidation on an entry, unless an extension of the time limit is granted pursuant to section 1504(b). We wish to stress that, as stated in section 159.12(a)(1)(ii) of the Customs Regulations, the authority to grant such an extension is solely within the discretion of the appropriate district director.

In regard to the amount to be deposited as estimated duties, we recognize that the final amount of the escalation payments will not be known at the time of entry. Therefore, we have no objection to a deposit of estimated duties based on the contract purchase price, less non-dutiable charges, provided the appropriate district director is satisfied that this amount is sufficient to cover the prospective duties on each item (see section 141.103, Customs Regulations). In addition, to the extent any of the generators to be imported are assembled abroad in part of components of United States origin, those components are entitled to duty-free treatment under item 807.00, TSUS, assuming compliance with the requirements of sections 10.11 through 10.24 of the Customs Regulations.

Finally, we must necessarily deny your request that Customs officers at the port of Buffalo, New York, be given the authority to make all appraisement determinations with respect to every shipment under the contract, regardless of whether or not all the shipments arrive at that port. Each district director has exclusive authority to appraise and classify all merchandise which arrives in the United States through that district. For purposes of obtaining uniformity of treatment in regard to the appraisement of shipments arriving through different ports, we suggest that you send a copy of this letter to each affected port along with a request that the appropriate Customs officials coordinate their appraisement decisions with the appropriate officials of the other affected ports.

(C.S.D.82-122)

This ruling holds that the duty on merchandise distributed as quantity discounts (for example, one extra with the purchase of 10), would be based on the price paid or payable for the entire shipment and not upon the value of each individual article.

Date: March 30, 1982
File: CLA-2 CO:R:CV:V
542741 LD

This is in response to your letter of February 10, 1982, concerning the dutiability of quantity discounts. You described a quantity discount as the inclusion of an additional piece of merchandise in an order when a specific number of items have been purchased, *i.e.*, one extra with the purchase of 10.

As the result of changes made to section 402 of the Tariff Act of 1930, as amended, by the Trade Agreements Act of 1979 (TAA), transaction value now is the primary basis of appraisement for merchandise imported into the United States. Transaction value is defined as "* * * the price actually paid or payable for the merchandise when sold for exportation to the United States * * *" plus the cost of certain incidentals set forth in section 402(b) of the Act. The price actually paid or payable is the total payment made or to be made for imported merchandise by the buyer to, or for the benefit of, the seller, considered without regard to its method of derivation. It may be the result of discounts or increases, may be arrived at through some formula, or through negotiation.

Based upon the foregoing, we are of the opinion that in the case of merchandise distributed as quantity discounts as described in your letter, duty would be based on the price paid or payable for the entire shipment and not upon the value of each individual article.

(C.S.D. 82-123)

This ruling concerns the interpretation of United States laws with regard to the fisheries and duties applicable to fishing vessels

Date: April 23, 1982
File: VES-7/VES-7-03-CO:R:CD:C
105533 PH
ES 82-02359

DEAR SENATOR STEVENS: With your letter of February 11, 1982, you forwarded a copy of a letter dated January 11, 1982, from Mr. Charles R. Webber, Commissioner of the Department of Commerce and Economic Development of the State of Alaska. In his letter, Mr. Webber asked several questions regarding the interpretation of United States laws regarding the fisheries. The questions asked by Mr. Webber with their answers are set forth below.

1. When any fishing vessel, properly authorized, takes fish on board as catch between the 3-mile limit and the 200-mile zone limit, are those fish U.S. goods or foreign goods? Does the registration of the vessel change the status of the goods (fish) for U.S. Customs classification? Status for Jones Act determination?

Under item 180.00, Tariff Schedules of the United States (TSUS), products of American fisheries (including fish, shellfish, and other marine animals), which have not been landed in a foreign country, or which, if so landed, have been landed solely for transshipment without change in condition, are not subject to any duty. An American fishery, for purposes of item 180.00, TSUS, as it applies to the questions asked by Mr. Webber, is defined in Headnote 1,

Schedule 1, Part 15, Subpart A, TSUS, as "* * * a fishing enterprise conducted under the American flag by vessels of the United States on the high seas * * *."

Accordingly, for fish taken on the high seas to be products of an American fishery and free of duty under the TSUS, they must have been caught by a United States-flag vessel. If caught by a foreign-flag vessel, the fish would not be products of an American fishery and would be subject to duty under Schedule 1, Part 3, TSUS, when imported into the United States.

Even if caught by a United States-flag vessel, the fish could lose their status as products of an American fishery if they were transshipped to a foreign-flag fish processing vessel for processing. Of course, before being landed in a port of the United States, the fish or fish products would have to be transshipped again to a United States-flag vessel qualified to so land the fish or fish products (see the discussion of 46 U.S.C. 251(a) in our answer to question number 3).

The Act of June 5, 1920, as amended (the so-called "Jones Act," c. 250, s. 27, 41 Stat. 999; 46 U.S.C. 883), prohibits the transportation of merchandise between points in the United States embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by citizens of the United States.

The status of the merchandise transported as United States goods or foreign goods is irrelevant for purposes of this provision. If fish or fish products are transported between points subject to the coastwise laws, including points within United States territorial waters, they are transported in the coastwise trade and must be transported on a coastwise-qualified vessel. The territorial waters of the United States do not extend beyond the territorial seas, defined as the belt, 3 nautical miles wide, adjacent to the coast of the United States and seaward of the territorial sea baseline. The Fishery Conservation Zone (FCZ), established by the Fishery Conservation and Management Act of 1975, as amended (16 U.S.C. 1801, 1811), is the zone between 3 miles and 200 miles from the baseline from which the territorial sea of the United States is measured. Generally, if the vessel which lands in the United States fish caught in the FCZ, by definition outside territorial waters, did not receive the fish in the territorial waters, it is not engaging in the coastwise trade.

> 2. Is it true that certain treaties with foreign governments have allowed fish caught in U.S. zones by foreign-flag vessels to retain their U.S. identity? Which treaties and what are their provisions?

We are not aware of any treaties which allow fish caught in the United States FCZ by foreign-flag vessels to be considered products of an American fishery, for tariff purposes. The Convention be-

tween the United States of America and Canada for the Extension of Port Privileges to Halibut Fishing Vessels on the Pacific Coast of the United States and of Canada (TIAS 2096) grants, on a reciprocal basis, to fishing vessels of Canada engaged in the North Pacific halibut fishery only, the following privileges in United States ports of entry. The Canadian fishing vessels may land their catches of halibut and sablefish without payment of duty and,

1. Sell them locally on payment of the applicable Customs duty;
2. Transship them in bond under Customs supervision to any port of Canada; or
3. Sell them in bond for export.

The Canadian fishing vessels also may obtain supplies, repairs and equipment in United States ports.

Although this Convention results in an exception from the prohibition in 46 U.S.C. 251(a), discussed in the answer to question 3, against the landing by a foreign-flag vessel in a United States port of fish caught on the high seas, it does not result in the duty-free treatment of fish caught by the privileged Canadian fishing vessels in the United States FCZ.

The Treaty Between the Government of the United States of America and the Government of Canada on Pacific Coast Albacore Tuna Vessels and Port Privileges (TIAS 10057) grants similar privileges, on a reciprocal basis, to Canadian Albacore Tuna fishing vessels. Landing privileges under this Treaty are limited to four United States ports and four Canadian ports. This Treaty also does not have the effect of granting duty-free treatment to fish caught by Canadian-flag vessels in the United States FCZ.

The Protocol Amending the Convention for the Preservation of the Halibut Fishery of the North Pacific Ocean and the Bering Sea (TIAS 9855) and its predecessors (see 16 U.S.C. 772–772j) and the International Convention for the High Seas Fisheries of the North Pacific Ocean, as amended (TIAS 2786, 4493, 4982, 5358, and 9242; see 16 U.S.C. 1021–1035), concern the halibut fisheries of the United States and Canada but do not have the effect of granting duty-free treatment to fish caught by Canadian or Japanese-flag vessels in the United States FCZ.

> 3. Can a U.S.-flag vessel gather fish from a foreign-flag vessel which has taken them, by proper permit, within or outside the 200-mile U.S. fisheries zone and land them either inside or outside a foreign trade zone? What duties, if any, would apply to that cargo of fish?

Under the Nicholson Act of September 2, 1950, as amended (c. 842, 64 Stat. 577, 46 U.S.C. 251(a)), no foreign-flag vessel shall land in a port of the United States, its catch of fish taken on board the vessel on the high seas or fish products processed therefrom, or any fish or fish products taken on board the vessel on the high seas from a vessel engaged in fishing operations or in the processing of fish or fish products. Because the vessel which lands the fish in the

United States in this instance would be a United States-flag vessel, there would be no violation of 46 U.S.C. 251(a).

If landed outside the confines of a Foreign Trade Zone (FTZ), the fish would be subject to duty under Part 3, Schedule 1, TSUS. Fish landed within the confines of an FTZ would not be subject to any duties until transferred from the FTZ to Customs territory.

If the fish are landed in the United States but not within the confines of an FTZ, they may be transported in bond, under normal Customs procedures, to the FTZ for admission. There would be no duty liability in such a case until the fish were transferred from the FTZ to Customs territory.

4. When a foreign-flag vessel lands its catch at its own foreign home port, what law allows this processed (or unprocessed?) fish to then be loaded upon a foreign-flag cargo vessel and received at a U.S. port, seemingly contrary to the Jones Act?

The Jones Act (46 U.S.C. 883) was discussed in our answer to question number 1. Foreign-flag vessels are prohibited under 46 U.S.C. 251(a) from fishing in United States territorial waters. Thus, in this instance the fish would have to have been caught outside territorial waters and could not have been transported between points in the United States embraced within the coastwise laws. There would not be a violation of the Jones Act.

This transaction also would not be prohibited by the part of 46 U.S.C. 251(a) regarding the landing of fish in the United States because the vessel which brings the processed or unprocessed fish to the United States would not have caught the fish or taken them on board on the high seas.

Title 46, United States Code, section 251(a), prohibits a "* * * foreign-flag vessel * * * *whether documented as a cargo vessel or otherwise* * * *" [emphasis added] from landing in a port of the United States fish it has caught, or fish or fish products it has taken on board, on the high seas. The intent of Congress in specifically referring to vessels documented as cargo vessels was stated to be to prevent a foreign-flag fishing vessel from transporting its catch of fish caught on the high seas to its home or foreign port, obtaining documentation as a cargo vessel, and then proceeding to a United States port and marketing its fish. (See House Report No. 2934, August 16, 1950, 1950 U.S. Code Congressional Service 3539.) This part of 46 U.S.C. 251(a) does not operate to prohibit a foreign-flag cargo vessel from loading, at a foreign port, fish which was caught on the high seas, whether in the United States FCZ or not, and transporting the fish to the United States and there landing them.

5. A U.S. documented vessel harvests fish in the U.S. Fisheries Conservation Zone and passes its catch of round fish still contained in the trawl cod end to a Japanese documented processing vessel. The venture has received proper U.S. and Japa-

nese Government approvals. The fish are then processed by freezing on board the Japanese processing vessel. Can these products be landed directly by the foreign processor at a U.S. port? If the Japanese processing vessel was operating at the direction of the U.S. corporation or was under charter to a U.S. corporation and ownership of the fish and frozen products at all times remained with a U.S. corporation (U.S. citizens), could the products be landed? If, under some set of conditions, the products could be landed by the Japanese processing vessel, would the products be subject to U.S. duty?

Title 46, United States Code, section 251(a), discussed in the answer to question number 3, would prohibit the landing of the fish or fish products in a United States port by the processing vessel because that vessel is a foreign-flag vessel. Even if the processing vessel were operated at the direction of a United States corporation, or under charter to a United States corporation and ownership of the fish and frozen products remained with a United States corporation, the fish products could not be landed in a port of the United States by the processing vessel without violating 46 U.S.C. 251(a) because that vessel would still be a foreign-flag vessel.

Dutiability of the fish products would be controlled by Schedule 1, Part 15, Subpart A, TSUS, which contains item 180.00, TSUS, discussed in the answer to question number 1, and Schedule 1, Part 3, TSUS. However, as we have indicated, the fish products under consideration could not be landed in a United States port by the Japanese-flag processing vessel without violating 46 U.S.C. 251(a). If the fish products were transshipped outside territorial waters from the Japenese-flag processing vessel to a United States-flag vessel, and the transshipment to the processing vessel also had taken place outside territorial waters, the fish products could be landed in the United States without a violation of 46 U.S.C. 251(a) or 883 occurring. However, because the fish would have been processed on board a foreign-flag vessel, they would not be considered products of an American fishery (see the discussion of this term in the answer to question number 1) and would be subject to duty under Schedule 1, Part 3, TSUS.

We are enclosing copies of the materials referred to in this letter and of the sections of the Customs Regulations pertaining to the fisheries. We hope we have been able to assist you and that you will feel free to call on us if we can help you in the future.

(C.S.D. 82-124)

This ruling holds that where the total payment to the seller as part of the import transaction on merchandise includes a buying commission, such payment is necessarily included in the price paid or payable for purposes of determining transaction value.

Date: April 29, 1982
File: CLA-2 CO:R:CV:V
542785 BLS

DEAR SIR:

Re: Application for Further Review of Protest No. 1001-1-003979

This is in reference to the above-captioned matter, which involves the dutiability of a 5 percent fee paid by the importer to the foreign seller for export services under section 402, Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (TAA).

In addition to a specific price for the imported merchandise, the importer has agreed to pay the foreign supplier a separate commission of 5 percent for certain export services. These services include arranging for consolidation of shipments, appropriate export and import documentation, ocean and inland freight, and insurance and other services necessary to place the merchandise in condition packed, ready for exportation to the United States.

The importer argues that such payment does not relate to payment for the merchandise, but rather is in the nature of a buying commission, and should be considered nondutiable as "related services incident to the international shipment of the merchandise from the country of exportation to the place of importation in the United States." (See section 402(b)(4)(A).) The importer cites decisions under prior law in which payments inuring to the benefit of the foreign seller were held to be non-dutiable where the costs were incurred after the goods were in condition packed ready for shipment to the United States.

On the other hand, the Chief, Duty Assessment Branch, New York Seaport, is of the opinion that under the transaction value basis of appraisement, the 5 percent payment should be considered part of the price paid or payable for the merchandise, and accordingly, is a dutiable charge.

Transaction value is defined as the price "actually paid or payable" for the merchandise when sold for exportation to the United States, plus amounts for certain items specifically enumerated in section 402(b)(1). The term "price paid or payable" is defined under section 402(b)(4)(A) as "the total payment (whether direct or indirect, and exclusive of any costs, charges, or expenses incurred for transportation, insurance, and related services incident to the international shipment of the merchandise from the country of exportation to the place of importation in the United States) made, or to

be made, for imported merchandise by the buyer to, or for the benefit of, the seller."

Since a buying commission is not one of the items specifically enumerated under section 402(b)(1), it cannot be *added* to the price to arrive at transaction value. However, where the total payment to the seller as part of the import transaction *includes* a buying commission, there is no authority under the statute to make the deduction sought by the importer. Rather, such payment is necessarily included in the price paid or payable for purposes of determining transaction value.

Nor do we agree that the services performed are " * * * incident to the international shipment of the merchandise from the country of exportation to the place of importation in the United States." Such services occur prior to the time the merchandise leaves the country of exportation. Furthermore, while case law under the prior statute may be helpful in determining the *bona fides* of a buying commission, it is irrelevant in determining whether an amount paid to the foreign seller is part of the price actually paid or payable.

Under the circumstances, you are directed to deny the protest.

(C.S.D. 82-125)

Classification: This decision holds that the term, "cotterless type crank sets", parts of bicycles provided for in items 732.41 and 912.10, Tariff Schedules of the United States does not cover one-piece American type crank sets

Date: May 19, 1982
CLA-2 CO:R:CV:G
069847 MJ

DEAR SIR:

Re: Request For Internal Advice No. 49/82

You request advice on the proper interpretation of "cotterless type crank sets," which are parts of bicycles provided for in item 732.41, Tariff Schedules of the United States (TSUS), dutiable at the rate of 11.6 percent ad valorem. Item 912.10, TSUS, suspends the duty on "cotterless type crank sets," among other bicycle parts, if entered before June 30, 1983.

Facts

A bicycle crank set is a rear wheel assembly that normally includes crank arms, some form of axle, and any necessary hardware. The crank arms attach to the axle and to the sprocket of the chainwheel; the bicycle pedals fit onto the free ends of the crank arms. A crank set, of course, provides the leverage for the rider to drive the chainwheel and propel the bicycle.

Bicycle crank sets are designed in at least three different ways. The first type is known as a one-piece, American crank set. As shown in Attachment 1, one shaped metal piece serves as both crank arms. The crank slips through the base hole of the bicycle frame, and thus also serves as the axle. One side of the crank is held to the frame by various pieces of hardware, including a lockwasher and a locknut. The other side of the crank connects to the sprocket of the chainwheel.

A cottered crank set, also known as a European-type crank with cotter, uses two crank arms and a separate axle (hence, it is known as a three-piece set), as shown in Attachment 2. The axle, called a pedal spindle, fits through the base hole of the frame; a notch or groove is cut perpendicularly on each end of the pedal spindle. Each end of the pedal spindle fits through a hole on one end of each crank arm. The cotter pin is wedged beneath the notch or groove through a set of small openings on each side of the hole, and a screw and cap secures the cotter. The cotter pins, then, are the critical parts for securing the crank arms to the pedal spindle.

A cotterless crank set, also known as a European-type cotterless crank, also uses two crank arms and a separate axle, as shown in Attachment 3. But the shape and extension of the axle, known as a crank spindle, differs from that of the pedal spindle. Each end of the crank spindle fits through the hole on one end of each crank arm. A mounting bolt screws into each end of the crank spindle, securing each crank arm. A crank arm cap is then screwed into the threaded hole of each crank arm to complete the assembly.

Legislative History

Pub. L. 95–161, Sec. 3 (effective January 1, 1977 to January 30, 1980) added "cotterless type crank sets" to the list of bicycle parts on which duty was suspended. The effective period for the suspension of duty was extended from June 30, 1980 to June 30, 1983, by Pub. L. No. 96–467, sec. 11 (October 17, 1980). The list is codified in item 912.10, TSUS (19 U.S.C. 1202). When Pub. L. 95–161 was passed, the bicycle parts now covered by item 912.10, TSUS, were dutiable at the rate of 15 percent ad valorem. Imported complete bicycles were then dutiable at rates ranging from 5.5 to 11 percent ad valorem. Because a substantial part of the value of domestically produced bicycles consisted of imported components, Congress found this tariff structure to be anomalous. When a domestic producer of a manufactured product relies heavily on foreign components, then any duty on the components subtracts from the protection offered by the duty on the imported manufactured product. The effective rate of protection is then less than the nominal rate that applies to the imported completed product. Congress increased the effective rate of protection for the domestic production of bicycles, but also limited the suspension to bicycle components that were not produced in substantial volume in the United States. *See*

Sen. Rep. No. 95–420, 95th Congress, 1st Sess., 3381 (1977). The effective rate of protection for bicycle producers was increased without eliminating protection enjoyed by domestic producers of components.

The legislative history of Pub. L. 95–161 does not define the term "cotterless type crank sets." An information report filed by the International Trade Commission (ITC) contains the only extended comment. The bill originally suspended duty on "alloy cotterless crank sets." The ITC suggested that the word "alloy" be deleted as redundant, because all cotterless sets were made of metal alloy, and also suggested:

> * * * That the description for cotterless crank sets be modified to read "cotterless type crank sets," in order to insure that crank sets of the cotter type which are imported without their cotter pins are not covered in the duty suspension provision. *Hearings On HR 5263 Before The Subcommittee On Trade of the House Ways and Means Committee,* 95th Congress, 1st session, 696 (1977).

The language of item 912.10, TSUS, conforms to this suggested change.

Analysis

There is no uniform and established practice for the classification of cotterless type crank sets. Some one-piece, American type cranks have been classified as cotterless type crank sets. The necessary premise for this classification is that a one-piece crank lacks cotters, and therefore falls within the common meaning of the term "cotterless." The common meaning of a term is presumptively consistent with the language of trade and commerce. But *Florsheim Shoe Co. v. United States,* 71 Cust. Ct. 187, 190, C.D. 4495 (1973) sets forth the rule of interpretation when a term's commercial meaning varies from its common meaning:

> Where, however, it is affirmatively established that a tariff term at the time it was enacted into law, had a meaning in trade and commerce of the United States which differed from the common meaning and was uniform, definite and general, such meaning will be adopted, unless a contrary intention of Congress is clearly manifested.

A survey of the trade literature on bicycle parts reveals that a one-piece crank set is commercially distinct from a cotterless type crank set. For example, both the *Schwinn Bicycle Guide* and the *Japan Bicycle Guide* distinguish among one-piece cranks, three-piece cotter cranks, and three-piece cotterless cranks. The word "cotterless" is never used to describe a one-piece crank. *Glenn's Complete Bicycle Manual* also distinguishes among the three in its instructions on their disassembly and cleaning. The trade literature reveals that cotter pins are a relevant method of assembly

only when three-piece crank sets are used. When separate crank arms are used, they can be attached to the separate axle piece either by cotter pins or by mounting bolts and crank arm caps. The one-piece crank does not require attachment of separate crank arms to a separate axle, so the terms "cottered" or "cotterless" have no mechanical or commercial relevance in describing them. These commercial distinctions were recognized in the trade when Pub. L. 95-161 was passed, and continue to be recognized. Therefore, the term "cotterless" is used, not in the common sense of "absence of a cotter," but in the commercial sense distinguishing between different methods of assembly of three-piece crank sets (separate crank arms and a separate axle).

The legislative history, while far from "clearly manifested," offers some support to this analysis. The ITC suggestion, as quoted above, implies that it is the design of a crank set, not the literal absence of a cotter, that distinguishes one crank set from another. Further, a representative of the ITC informally advised Customs that at the time cotterless crank sets were added to item 912.10, TSUS, one-piece crank sets were produced in the United States in substantial volume while the cotterless type three-piece crank sets were not. The one-piece cranks continue to be produced in the United States in substantial volume.

Conclusion

For these reasons the term "cotterless type crank sets" does not cover one-piece, American type crank sets. The attachments referred to above provide guidance in distinguishing among the various crank sets discussed in this ruling.

(C.S.D. 82-126)

Subject: Transaction Value: Transaction value is not affected by an agreement made subsequent to exportation which retroactively adjusts the price of imported merchandise

Date: MAY 19, 1982
File: CLA-2 CO:R:CV:V
542797 BLS
TAA # 48

TO: Area Director of Customs, New York, New York 11430

FROM: Director, Classification and Value Division

SUBJECT: Request for Internal Advice No. 60/82

Issue

Whether transaction value is affected by an agreement made subsequent to exportation which retroactively adjusts the price of imported merchandise.

Facts

Manufacturer grants to its overseas affiliates, including its U.S. subsidiary ("Importer"), a discount from the suggested retail price. As of January 1981, that discount was 20 percent. However, by the end of 1980 and the beginning of 1981, the pound sterling stood at a very high level in relation to the dollar, affecting the dollar prices to Importer as well as having an adverse effect on their 1980 earnings. As a result, the parties agreed that the price to Importer should reflect an additional 5 percent discount during 1981.

From January through the middle of October 1981, all merchandise shipped to Importer was priced accordingly, and duty was paid on the transaction price. The pound meanwhile declined about 25 percent with respect to the dollar and in a meeting held in September 1981, the companies agreed that the additional 5 percent discount had been based on an assumption that proved unwarranted.

The parties then agreed on a retroactive adjustment, reverting to the original 20 percent discount and elimination of the extra 5 percent. Accordingly, an invoice dated October 15, 1981, was prepared, reflecting the retroactive price adjustment.

Importer points out that the prices agreed upon in January, reflecting the additional 5 percent discount, were firm prices and not thought to be subject to adjustment. As a result, Importer believes that there was a price paid or payable for the merchandise when sold for exportation within the meaning of section 402(b)(1), Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (TAA), represented by the transfer price originally agreed upon by the parties. Importer argues that the additional payments representing a retroactive adjustment to the agreed price should not be considered part of the dutiable value of the merchandise.

Law and analysis

In TAA #25, dated May 13, 1981, an overseas subsidiary sold merchandise to its U.S. parent at transfer prices which reflected standard estimates of costs plus a factor for profit. Since the actual cost of parts shipped overseas and of the articles returned were not known until accounting data was subsequently analyzed, the standard prices were adjusted retroactively on the basis of actual costs once every 3 months, and possibly again at the end of the fiscal year.

In that case, we pointed out that if at the time the original transfer price information (prepared in accordance with generally accepted accounting principles) is submitted to Customs, the related party price is found to be acceptable under section 402(b)(2)(B), then the statutory basis of appraisement will be transaction value. This will be true whether or not the transfer price contains all elements of value.

We summarized the principles involved as follows:

1. Transfer prices established in accordance with generally accepted accounting principles provide a legitimate statutory basis of establishing transaction value;
2. It is not necessary under the law to wait for retroactive pricing adjustments in order to liquidate the concerned entries;
3. Retroactive price adjustments would not negate previously established transaction values.

Similarly, in the instant case, if the transfer price submitted to Customs properly reflects the agreement between the parties, and the relationship is found not to influence the price charged, then transaction value as represented by that price without subsequent adjustment, is applicable. The retroactive payments are not considered part of the price paid or payable for the merchandise and therefore are not dutiable.

In this regard, our New York office advises that the available evidence shows that the prices charged Importer by its parent cover the cost of production plus a mark-up for profit; that all prices are negotiated under circumstances in which each company has as its objective earning an appropriate level of profit; that Importer is responsible for its own profit performance; and that the manner in which business is being conducted is not inconsistent with the practice in the industry in question. As a result, New York has concluded that the nature of the relationship does not influence the prices charged to Importer. That port has been appraising the merchandise under transaction value since July 1, 1980.

This situation must be distinguished from a case where the parties agree to an addition to the price paid or payable based upon a condition subsequent such as a resale of the merchandise in the United States above a certain price; or where the parties otherwise contemplate a change in the contract price prior to exportation.

Holding

The basis of appraisement of the instant merchandise is transaction value, represented by the price originally agreed upon by the parties. Such price is not affected by the subsequent retroactive adjustment.

(C.S.D. 82-127)

This ruling holds that waste cannot be the subject of drawback

and that the quantity of designated merchandise replaced by waste cannot be reserved for drawback in a later claim. The value of recovered waste is compared to the value of merchandise used in manufacture and not to the value of designated merchandise

Date: May 20, 1982
File: DRA-1-09-CO:R:CD:D
214068 B

Issues

In substitution drawback, with the basis of the claim being used in less valuable waste, is the value of the waste decided by the unit value of the designated or of the substituted merchandise to determine the amount by which the designated merchandise is reduced during the computation of the drawback?

Facts

In a drawback claim under 19 U.S.C. 1313(b) the designated merchandise has a value of $0.80 per pound and the substituted merchandise a value of $1.00 per pound. To produce the exported articles 100 pounds of merchandise was used and the waste has a value of $10.00.

Law and Analysis

This issue first arose in 1931 (BL 1-26-32 to the Collector of Customs, Cleveland) and it was ruled that the value of the substituted merchandise should be used to determine the amount of the deduction. It should be noted that the quantity of the waste must be determined from the manufacturing operation used to produce the exported articles and that, since the designated merchandise may be used to produce a different type of article, the waste resulting therefrom could be entirely different. The value of the waste is determined at the time of production.

Holding

When the basis of claim is used-in-less-valuable waste in substitution drawback, the value of the waste is divided by the unit value of the substituted merchandise to determine the amount of reduction applicable to the designated merchandise to compute the drawback.

(C.S.D. 82-128)

Temporary Importation Bond: This decision holds that the term, "Destroyed under Customs supervision" in section 10.39(a), Customs Regulations, does not require on site observation of the destruction by the U.S. Customs Service

Date: May 26, 1982
File: DRA-1-09-CO:R:CD:D
214128 B

Issue

Does "destroyed under Customs supervision" in Section 10.39(a), Customs Regulations, require onsite Customs observation of the destruction of merchandise?

Law and Analysis

Section 10.39(a) of the Customs Regulations states that destruction of merchandise (except accidental destruction and merchandise destroyed by testing under item 864.30, TSUS) in lieu of exportation must occur under Customs supervision, as provided in 19 U.S.C. 1557(c) and section 158.43 of the regulations. For "destruction under Customs supervision" the importer must file an application on Customs Form 3499 with a district director of Customs. After approving this application, the district director or a designee may or may not attend the actual destruction, as the facts warrant. However, he must always have the opportunity to attend. This is the essence of "destruction under Customs supervision." It does not pose a threat to the revenue because of spot destruction monitoring and auditing of the importers' records supporting the fact of destruction.

Facts

The District Director of Customs, Cleveland, has been advised by the Port Director of Customs, Cincinnati, that due to staff shortages and budget constraints it is becoming difficult, if not impossible in some cases, to assign field personnel to sites where merchandise admitted under a temporary importation bond (TIB) is to be destroyed. In many instances, the merchandise to be destroyed must be taken to Environmental Protection Agency dumping areas for the operations, and in one case referred to by the Port Director, the importing corporation must dispose of its imported material at a dumping site approximately 120 miles from the nearest Customs office.

Holding

"Destroyed under Customs supervision" in section 10.39(a), Customs Regulations, does not require on site observation of the de-

struction by Customs but does require the opportunity to observe the destruction.

(C.S.D. 82-129)

This ruling holds that food concession equipment for use in the production of pizza for sale in the United States is not entitled to entry under item 864.50, TSUS, nor under any other TIB provision

Date: May 28, 1982
File: CON-9-CO:R:CD:D
214373 SMC

Issue

Whether equipment used for the manufacture/production of pizzas for sale in the United States may be entered temporarily free of duty as tools of trade under item 864.50, Tariff Schedules of the United States (TSUS).

Facts

A food concession unit mounted on a truck consisting of a pizza oven and vending machine with other necessary equipment needed for the purpose of manufacturing/producing pizzas at various state fairs was imported into the United States by a Canadian resident. The question has arisen whether the equipment qualifies as tools of trade under item 864.50, TSUS.

Law and Analysis

Item 864.50, TSUS, provides for the temporary admission free of duty under bond for:

> Professional equipment, tools of trade, repair components for equipment or tools admitted under this item, and camping equipment; all the foregoing imported by or for nonresidents sojourning temporarily in the United States and for use of such nonresidents.

The intent of this temporary importation under bond provision, as well as the others, was not that it be applied so as to divert jobs from American labor or interfere with domestic commerce. Thus the Customs Service has held that the entry of equipment to be used in the manufacture/production of articles for sale in the United States would be contrary to the intended purpose of item 864.50, TSUS, and therefore not entitled to entry under this section.

Conclusion

Food concession equipment for use in the production of pizzas for sale in the United States is not entitled to entry under item 864.50, TSUS, nor under any other TIB provision.

(C.S.D. 82-130)

Transaction Value: This decision holds that, pursuant to section 402(b)(2)(A) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, transaction value cannot be determined in instances where the importer and shipper, shipping and invoicing two types of merchandise together, deliberately inflate the price of one item on the visaed invoice and off-set the inflated price by correspondingly decreasing the price of the other item

Date: June 3, 1982
File: CLA-2 CO:R:CV:V
542747 TLL

TO: District Director of Customs, Minneapolis, Minnesota 55401

FROM: Director, Classification and Value Division

SUBJECT: "Free Quota" Contract Prices: IA 184/81

This is in reply to your internal advice request dated November 4, 1981, concerning the dutiability of higher than contract prices used to obtain "free quota" when such prices are off-set by lower than contract prices on other merchandise. Your request was received in this division on February 22, 1982.

The facts in this case are not particularly difficult. In fact, they represent only a slight variance from the second situation described in TAA #5, later rescinded in TAA #26; however, as that latter ruling concerned a prospective ruling request, and this current request does not, we are of the opinion that no bar to our issuing a ruling exists here.

According to a letter from the concerned importer, the specific facts of the case are as follows. The importer places an order for a wearing apparel item at a certain price arrived at through the usual negotiation process. He also orders another type of merchandise, for example, luggage at another separately negotiated price. The two types of merchandise are then shipped at the same time and are invoiced together. For purposes of illustration, let us assume that the agreed upon price for the wearing apparel item is U.S. $10 and the agreed upon price for the luggage is U.S. $20. Equal quantities of both types of merchandise are then shipped at the same time.

In order to obtain a free quota allocation, the importer and shipper agree to deliberately inflat the price of the wearing apparel item on the visaed invoice and off-set the inflated price by corre-

spondingly decreasing the price of the luggage. Accordingly, the visaed invoice would reflect the wearing apparel item priced at $15.00 and the price for luggage of $15.00. While the individual prices have obviously been manipulated, the total amount of the invoice would not change. There are no over payments or refunds.

Our review of the case and section 402(b)(2)(A) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, has led us to conclude that the transaction under consideration is subject to a condition or consideration for which a value cannot be determined with respect to the imported merchandise. In this regard, section 402(b)(2)(A) provides, in relevant part:

(2)(A) The transaction value of imported merchandise determined under paragraph (1) shall be the appraised value of that merchandise for the purposes of this Act only if——

> "(ii) The sale of, or the price actually paid or payable for, the imported merchandise is not subject to any condition or consideration for which a value cannot be determined with respect to the imported merchandise."

It seems to us that the off-set arrangement has a value (otherwise the parties would never have entered into it) and that value cannot be determined with respect to the imported merchandise. Consequently, we have no alternative but to find this type of off-set arrangement a bar to the finding of transaction value.

U.S. Customs Service

General Notice

Notice of Application for Recordation of Trade Name "THE BAYER COMPANY"

Application has been filed pursuant to section 133.21, Customs Regulations (19 CFR 133.12), for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "THE BAYER COMPANY," used by Sterling Drug Inc., a corporation organized under the laws of the State of Delaware, 90 Park Avenue, New York, New York 10016.

The application states that the trade name is used in connection with pharmaceuticals manufactured in Canada, West Indies and the United States. Sterling Drug Ltd., of Aurora, Canada, is authorized to use the trade name. Appropriate accompanying papers were submitted with the application.

Before final action is taken on the application, consideration will be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation of this trade name. Any such submission should be addressed to the Commissioner of Customs, Entry, Licensing and Restricted Merchandise Branch, Washington, D.C. 20229, in time to be received no later than 60 days from the date of publication of this notice in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Harriet Lane, Entry, Licensing and Restricted Merchandise Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. (202-566-5765).

Notice of the action taken on the application for recordation of this trade name will be published in the Federal Register.

Dated: September 9, 1982.

DONALD W. LEWIS,
Director, Entry Procedures
and Penalties Division.

ERRATUM

In CUSTOMS BULLETIN, Vol. 16, No. 29, in T.D. 82-121, on page 9, change the date of discontinuance to 6/30/82 [2] and not 6/30/75 [2] for the principal Alltrans Express Div. of T.N.T. Canada Inc.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
Morgan Ford
Frederick Landis
James L. Watson
Herbert N. Maletz
Bernard Newman
Nils S. Boe

Senior Judge

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 82-69)

AMERICAN AIR PARCEL FORWARDING COMPANY, LTD., A HONG KONG CORPORATION; AND E. C. MCAFEE COMPANY, A MICHIGAN CORPORATION, FOR THE ACCOUNT OF AMERICAN AIR PARCEL FORWARDING COMPANY, LTD., PLAINTIFFS *v.* UNITED STATES OF AMERICA; THE SECRETARY OF THE TREASURY; UNITED STATES CUSTOMS SERVICE; THE COMMISSIONER OF CUSTOMS, UNITED STATES CUSTOMS SERVICE; THE ASSISTANT COMMISSIONER OF CUSTOMS (COMMERCIAL OPERATIONS), UNITED STATES CUSTOMS SERVICE; DIRECTOR, OFFICE OF REGULATIONS AND RULINGS, UNITED STATES CUSTOMS SERVICE; AND DISTRICT DIRECTOR OF CUSTOMS, UNITED STATES CUSTOMS SERVICE, DETROIT, MICHIGAN; JOINTLY AND SEVERALLY, DEFENDANTS

Court No. 82-2-00165

Before LANDIS, *Judge.*

Memorandum and Order on Plaintiffs' Motion for a Preliminary Injunction

[Plaintiffs motion granted to the extent indicated.]

(Dated August 31, 1982)

Richard A. Kulics, attorney for plaintiff E. C. McAfee Company, a Michigan Corporation, for the Account of American Air Parcel Forwarding Company, Ltd.

Goodman, Miller & Miller (Jonathan Miller of counsel) for the plaintiff American Air Parcel Forwarding Company, Ltd., a Hong Kong Corporation.

J. Paul McGrath, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch *(Susan L. Handler-Menahem* and *Madeline Kuflik* of counsel) for the defendants.

LANDIS, *Judge:* In this action involving the valuation of made-to-measure clothing produced in Hong Kong, plaintiffs move for a preliminary injunction pursuant to Rule 65 of this Court.

The court held a hearing on the preliminary injunction motion and, during the hearing, denied defendant's motion to dismiss the action (R-9). Defendant further moved to quash certain subpoenae duces tecum and for a protective order regarding certain documents. The court reserved ruling as to the documents in issue, ordering that they be produced for an *in camera* inspection to determine whether they could be released to opposing counsel. The court permitted the subpoenaed witnesses to testify only as to matters outside the scope of the documents submitted for the *in camera* inspection.

Subsequently, the court promulgated a written order holding that documents relating to an ongoing criminal proceeding which may be seriously impaired, if not completely abrogated, if the documents were released even under protective order. The court also ordered that both sides submit supplemental memoranda if they so desired.

After submission of said memoranda a further hearing was held on the preliminary injunction motion. Since the latter hearing plaintiffs have submitted a motion to file a supplemental memorandum of law, opposed by defendant and, additionally, have filed a motion for summary judgment.

The factual background indicates that on October 17, 1980, the United States Customs Service issued a ruling, *Export Value: Dutiability of Sales from Manufacturers to Distributors,* C.S.D. 81–72, (TAA # 10). This ruling was premised upon the facts that distributors in Hong Kong employ representatives who take orders from customers in the United States. The distributors then contract with various small tailoring establishments in Hong Kong to produce the garments.[1] These tailors are responsible for all aspects of production including the purchasing of fabrics from piecegood houses. The tailors sell the completed garments to the distributors.

This ruling basically held that the sales between tailors and distributors in Hong Kong of made-to-measure clothing are appropriate for establishing export value provided the price to the distributors includes all the essential elements of value, including the costs incurred by the tailors in purchasing the required fabrics. The ruling further held that under the specific circumstances of this case, sales between tailors and distributors in Hong Kong may be used to establish the price actually paid or payable for the merchandise when sold for exportation to the United States under section 402(b) of the Trade Agreements Act of 1979, providing the requirements set forth in that statutory provision for establishing transaction value are satisfied.

It should be noted that C.S.D. 81–72 is a response to a memorandum by the District Director of Detroit, Michigan, dated January 16, 1980, which requested internal advice regarding the importation of made-to-measure clothing from Hong Kong. It was based upon unverified facts submitted in the internal advice request and apparently upon some information furnished by plaintiff American Air Parcel's attorney. By memorandum dated October 8, 1980, the Director, Duty Assessment Division, Headquarters, requested the Office of Investigations to initiate an inquiry to verify the description of the Hong Kong wearing apparel trade.

---

[1] These small tailoring establishments allegedly belong to the *Hong Kong Tailoring Contractors Association.* This association meets each year and sets the uniform price that is to be paid by buyers for cut, make and trim operations.

On March 12, 1981, the District Director, Port of San Francisco, requested Headquarters to reconsider ruling TAA#10 submitting a memorandum in support thereof.

On July 23, 1981, Headquarters (Director, Classification and Value Division) affirmed TAA#10. This ruling was based upon the description of the Hong Kong apparel trade as set forth in the original internal advice request of which TAA#10 was a product.

On August 21, 1981, the Office of Regulations and Rulings reported that they reviewed and analyzed various other rulings and reports [2] and concluded that the trade patterns in the made-to-measure clothing industry in Hong Kong conflict with a decision relied upon for the issuance of TAA#10 and other rulings.

On September 9, 1981, the United States Customs Service issued an internal, unpublished telex from Headquarters to the field offices requiring the assessment of duties *on the basis of the price paid by the United States consumer to the Hong Kong distributor* instead of the price paid by the Hong Kong tailor to the Hong Kong distributor. This, in effect, completely abrogated ruling TAA#10.

Plaintiff's Freedom of Information Act (FOIA) request for the evidentiary basis of this decision was denied on September 29, 1981, and said denial was affirmed by the United States Customs Service following plaintiff's administrative appeal on the ground that the Customs investigation had been converted into an enforcement proceeding.

Plaintiff next made an informal administrative appeal to U.S. Customs Service Headquarters. During the pendency of this hearing several hundred entries previously made were immediately liquidated on the basis of the upublished telex of which plaintiff was not officially informed of until October 19, 1981. On December 3, 1981, plaintiff participated at a hearing held in U.S. Customs Service Headquarters in Washington, D.C.

Plaintiff, an American firm with offices in Hong Kong, consolidates large shipments of these completed garments in Hong Kong and forwards them to Detroit by air freight. This firm files entries in Detroit, allegedly paying required duties from their own account, and then further forwards the garments, C.O.D., by commercial carrier, (such as United Parcel Service), to the ultimate United States purchaser. Included in the C.O.D. payment is the duty that plaintiff is responsible to pay. Once plaintiff receives the C.O.D. payment, it cannot look to the ultimate purchaser nor the distributor to subsidize any increase in duty. Plaintiff argues that it is particularly injured by the abrogation of TAA#10 because it relied

[2] These rulings and reports include:
Made to Measure Clothing from Hong Kong; TAA#10, dated October 17, 1980; Headquarters Ruling 542406, dated July 23, 1981; Hong Kong Report of Investigation HR01CR103504, dated June 12, 1981; Detroit, Michigan and San Francisco, California Analyses of Report of Investigation, dated August 5, 1981, and August 7, 1981, respectively.

upon this ruling in setting its ultimate C.O.D. charges. Plaintiff states that such injury is sufficient to drive it out of business.

Plaintiffs seek the following relief: (1.) Reinstatement of the C.S.D. 81-72 ruling which holds that sales between tailors and distributors in Hong Kong of made-to-measure clothing are appropriate for establishing export value; (2.) Enjoining the Customs Service from liquidating the subject made-to-measure clothing; (3.) Cancelling prior liquidations of made-to-measure clothing not in accordance with C.S.D. 81-72; (4.) Allowing all protests with respect to entries liquidated under the September 9, 1981 telex; and (5.) Requiring the Customs Service to provide a record of the legal or factual differences found in any Report of Investigation or in any other manner, disagreeing with the facts in TAA#10, and the facts presented at the December 3, 1981, hearing held in Washington, D.C., which are material and relevant to the treatment of the transactions between Hong Kong firms and distributors.

The revocation of C.S.D. 81-72 (TAA#10) is not explained by defendant. It may have been based upon an investigation, the report of which has been determined confidential by this Court because it involves an ongoing investigation that could lead to criminal sanctions and penalties against officers of plaintiff American Air. On the other hand it may have been based upon other factors unbeknown to the court. In any event, this is a motion for a preliminary injunction.

Generally, four conditions must be met before a preliminary injunction is granted. There must be a threat of immediate irreparable harm; a showing that the public interest would be better served by issuing than by denying the injunction; that there is a likelihood of success on the merits; and that the balance of hardship on the parties favors the party seeking injunctive relief. *S. J. Stile Associates Ltd., et al.* v. *Dennis Snyder, et al.*, 68 CCPA —, C.A.D. 1261, 646 F.2d 522 (1981); *Asher* v. *Laird*, 475 F.2d 360 (D.C. Cir. 1973); *American Air Parcel Forwarding Company, Ltd., A Hong Kong Corporation* v. *United States*, 1 Ct. Int'l. Trade 293, 515 F. Supp. 47 (1981); *PPG Industries, Inc.* v. *United States, et al.*, 2 Ct. Int'l. Trade —, Slip Op. 81-59 (July 6, 1981).

It is the party seeking the preliminary injunction who has the burden of demonstrating the existence of the four factors or a proper combination thereof. *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F.2d 738 (2d Cir. 1953); *Charlie's Girls, Inc.* v. *Revlon, Inc.*, 483 F.2d 953 (2d Cir. 1973). It is generally the purpose of a preliminary injunction to grant a party a meaningful opportunity to present his case at a full trial on the merits and to obtain proper relief if so warranted. *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). Its nature is essentially to preserve the status quo pending final determination after a full hearing. *Checker Motors Corp.* v. *Chrysler Corp.*, 405 F.2d 319 (2d Cir. 1969).

It is against this criteria that the court will examine plaintiffs' motion for a preliminary injunction and evaluate the substantiating evidence.

In reviewing reasonable likelihood of success on the merits standard, it must be remembered that C.S.D. 81-72 (TAA#10) is an official ruling by Customs Headquarters. It was promulgated after a request for internal advice and subsequently published in the CUSTOMS BULLETIN (15 Cust. B. & Dec. Vol. 10, p. 45) pursuant to 19 CFR § 177.10(a). The Chief of the Value Branch of the Division of Classification and Valuation, Irving W. Smith, Jr., specifically stated on redirect examination that TAA#10 is a ruling (R. 66).

As a ruling TAA#10 established a uniform practice under 19 CFR § 177.10(b). Since the unpublished telex ruling in issue abrogated TAA#10 and imposed a higher rate of duty or charge on the merchandise in question, the telex ruling must find that TAA#10 was clearly wrong. 19 CFR § 177.10(b). However, there is no indication that this ruling found TAA#10 to be clearly wrong. Further, before the publication of a ruling which has the effect of changing a practice and which results in the assessment of a higher rate of duty, notice that the practice (or prior ruling on which the practice is based) is under review must be published in the Federal Register and interested parties must be given the opportunity to make written submission as to the correctness of the contemplated change. 19 CFR § 177.10(c). The court has not been able to uncover the required publication in the Federal Register nor has defendant come forward with such evidence.

In view of the foregoing it is not beyond peradventure that plaintiffs have a likelihood of success on the merits. This is not meant to be construed as a procedural or substantive determination of these facts by this Court. It should be construed only that sufficient questions have been raised as to permit plaintiffs further inquiry on a full trial on the merits without losing their position prior to the abrogation of TAA#10.

Under the immediate irreparable harm standard, plaintiffs have not conclusively demonstrated that they will be irreparably harmed without the injunction. However, there is no requirement that plaintiffs demonstrate *conclusively* that they will suffer irreparable harm. Plaintiffs must show that there exists a viable threat of serious harm which cannot be undone. *S. J. Stile Associates Ltd. et al.* v. *Dennis Snyder, et al., supra.* The court will not issue a preliminary injunction merely to prevent a possibility of injury, even though the prospective injury may be great. *PPG Industries Inc.* v. *United States, supra.* As presently existing, actual threat must be shown. *State of New York* v. *Nuclear Regulatory Commission,* 550 F.2d 745 (2d Cir. 1977); Wright & Miller, *Federal Practice and Procedure, Civil,* § 2948 (1973).

In the present action, plaintiffs have adequately demonstrated that there is a real and actual threat of immediate irreparable

injury. A cursory look at the difference in valuations and subsequent duties imposed indicates that plaintiffs may readily be driven out of business. In fact, plaintiff American Air is currently in a Chapter XI bankruptcy. Threat to a business enterprise is considered a basis of irreparable injury. This Court has recently stated: "It is difficult for this court to envision any irreparable damage to a plaintiff and his business more deserving of equitable relief than the very loss of the business itself." *Erstine Clark McAfee D.B.A. E. C. McAfee Customs Broker, a Sole Proprietorship* v. *United States,* 3 Ct. Int'l. Trade ——, 531 F. Supp. 177 (1982). *Semmes Motors, Inc.* v. *Ford Motor Co.,* 429 F.2d 1197 (2d Cir. 1970).

In reviewing the balancing of the hardships placed upon the parties, it is evident that the scale tips decidedly in plaintiffs' favor. To reiterate, plaintiff *American Air* may be driven out of business as is true of plaintiff *McAfee* if the preliminary injunction is not granted. Further, defendant can be adequately protected by the posting of certain bonds by plaintiffs, *Ohio Oil Company* v. *Conway,* 279 U.S. 813 (1929). The bonds posted pursuant to Rule 65(c) will protect the public interest and the revenue derived from import duties. In view of this protection, it is in the public interest to impose this preliminary injunction with a subsequent full hearing on the merits to insure that defendant is complying with its own regulations pursuant to legislative mandate and affording plaintiffs their right to due process of law.

In conclusion, this Court recognizes that a preliminary injunction is an extraordinary remedy which should be granted sparingly, *Dorfmann* v. *Boozer,* 414 F. 2d 1168 (D.C. Cir. 1969). However, such relief is appropriate where there is a likelihood of success on the merits and the harm to movant is demonstrated to be irreparable. *Blackwelder Furniture Co.* v. *Selig Manufacturing Co.,* 550 F. 2d 189 (4th Cir. 1977). This is especially true where the person against whom the injunction is issued can be adequately protected by bonding or other means, *American Air Parcel Forwarding Company, Ltd., A Hong Kong Corporation* v. *United States,* 1 Ct. Int'l Trade 293, 515 F. Supp. 47 (1981).

The only issue remaining for determination is the posting of a bond pursuant to Rule 65(c). This Court is fully aware that plaintiff *American Air* is in financial difficulty. It is likely that plaintiff *McAfee* will follow the same route if the injunction is not granted. However, if plaintiffs file single entry bonds for double the amount of ordinary Customs duties of the merchandise in addition to a bond for the sum of twenty five thousand ($25,000) dollars to be filed with the Clerk of the Court of International Trade, defendant will be adequately protected.

Accordingly, it is hereby

Ordered, that plaintiffs' motion for a preliminary injunction is granted on condition that plaintiffs jointly file a bond in the amount of twenty five thousand ($25,000) dollars with the Clerk of

the Court of International Trade pursuant to Rule 65(c) of this Court, and on condition that plaintiffs file single entry bonds in double the amount of ordinary Customs duties of the merchandise entered; and it is further

Ordered, that C.S.D. 81-72 be reinstated as initially promulgated; and it is further

Ordered that all prior liquidations not in accordance with C.S.D. 81-72 be cancelled; and it is further

Ordered that plaintiffs shall post the required Court bond and single entry bonds relating to the cancellations of any prior liquidations within fifteen (15) days of the entry of this order by the Clerk; and it is further

Ordered that plaintiffs' motion to file a supplemental memorandum of law is granted, and has been considered by this Court in the instant decision.

International Trade Commission Notices

Investigations by the U.S. International Trade Commission

DEPARTMENT OF THE TREASURY, *September 15, 1982.*

The appended notices relating to investigations by the U.S. International Trade Commission are published for the information of Customs officers and other concerned.

WILLIAM VON RAAB,
Commissioner of Customs.

Investigations Nos. 701-TA-155, 157, 158, 159, 160, and 162 (Final)

CERTAIN CARBON STEEL PRODUCTS FROM SPAIN

AGENCY: United States International Trade Commission.

ACTION: Institution of final countervailing duty investigations and scheduling of a hearing to be held in connection with the investigations.

EFFECTIVE DATE: August 25, 1982.

SUMMARY: As a result of affirmative preliminary determinations by the United States Department of Commerce that there is a reasonable basis to believe or suspect that the Government of Spain is providing, directly or indirectly, subsidies with respect to the manufacture, production, or exportation of certain carbon steel products within the meaning of section 701 of the Tariff Act of 1930 (19 U.S.C. § 1671), the United States International Trade Commission hereby gives notice of the institution of the following investigations under section 705(b) of the Act (19 U.S.C. § 1671d(b)) to determine whether an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from Spain of the specified merchandise:

Hot-rolled carbon steel plate, provided for in items 607.6615, 607.9400, 608.0710, and 608.1100 of the Tariff Schedules of the

United States Annotated (TSUSA) (investigation No. 701-TA-155 (Final));

Cold-rolled carbon steel sheet, provided for in TSUSA items 607.8320 and 607.8344 (investigation No. 701-TA-157 (Final));

Galvanized carbon steel sheet, provided for in TSUSA items 608.0710, 608.0730, 608.1100, and 608.1300 (investigation No. 701-TA-158 (Final));

Carbon steel structural shapes, provided for in TSUSA items 609.8005, 609.8015, 609.8035, 609.8041, and 609.8045 (investigation No. 701-TA-159 (Final));

Hot-rolled carbon steel bar, provided for in TSUSA items 606.8310, 606.8330, and 606.8350 (investigation No. 701-TA-160 (Final)); and

Cold-formed carbon steel bar, provided for in TSUSA items 606.8805 and 606.8815 (investigation No. 701-TA-162 (Final)).

FOR FURTHER INFORMATION CONTACT: Mr. Robert Eninger (202-523-0312) or Mr. Daniel Leahy (202-523-1369), Office of Investigations, U.S. International Trade Commission.

SUPPLEMENTARY INFORMATION:

Background—On June 10, 1982, the Commission determined, on the basis of the information developed during the course of its preliminary investigations, that there was a reasonable indication that an industry in the United States was materially injured or threatened with material injury by reason of allegedly subsidized imports of the subject carbon steel products from Spain. The preliminary investigations were instituted in response to petitions filed on January 11, 1982, by six U.S. steel producers. The Department of Commerce will make its final subsidy determinations in these cases on or before November 8, 1982. The Commission must make its final injury determinations in the investigations within 120 days after the date of Commerce's preliminary subsidy determinations or by December 22, 1982 (19 CFR § 207.25). A public version of the staff report containing preliminary findings of fact will be placed in the public record on October 22, 1982, pursuant to section 207.21 of the Commission's Rules of Practice and Procedure (19 CFR § 207.21).

Hearing—The Commission will hold a hearing in connection with these investigations beginning at 10:00 a.m., e.s.t., on November 9, 1982, at the U.S. International Trade Commission Building, 701 E Street, NW., Washington, D.C. 20436. The hearing in these investigations will be held simultaneously with the hearing previously scheduled for antidumping investigations Nos. 731-TA-53, 58, 59, 60, 61, 62, 63, 67, 69, 70, 74, 82, 83, 85, and 86 (Final) concerning certain carbon steel products from Belgium, Brazil, France, Italy, Romania, the United Kingdom, and the Federal Republic of Germany (47 F.R. 38646). Requests to appear at the hearing should be filed in writing with the Secretary to the Commission not later than the close of business (5:15 p.m.) on October 21, 1982. All persons desiring to appear at the hearing and make oral presentations may file prehearing briefs and should attend a prehearing confer-

ence to be held at 10:00 a.m., e.d.t., on October 27, 1982, in Room 117 of the U.S. International Trade Commission Building. Prehearing briefs must be filed on or before November 3, 1982.

Testimony at the public hearing is governed by section 207.23 of the Commission's Rules of Practice and Procedure (19 CFR § 207.23). This rule requires that testimony be limited to a nonconfidential summary and analysis of material contained in prehearing briefs and to new information. All legal arguments, economic analyses, and factual materials relevant to the public hearing should be included in prehearing briefs in accordance with rule 207.22 (19 CFR § 207.22). Posthearing briefs must conform with the provisions of rule 207.24 (19 CFR § 207.24) and must be submitted not later than the close of business on November 17, 1982.

Written submissions.—Any person may submit to the Commission a written statement of information pertinent to the subject of these investigations. A signed original and fourteen (14) true copies of each submission must be filed with the Secretary to the Commission on or before November 17, 1982. All written submissions except for confidential business data will be available for public inspection.

Any business information for which confidential treatment is desired shall be submitted separately. The envelope and all pages of such submissions must be clearly labeled "Confidential Business Information." Confidential submissions and requests for confidential treatment must conform with the requirements of section 201.6 of the Commission's Rules of Practice and Procedure (19 CFR § 201.6).

Service of documents.—Any interested person may appear in these investigations as a party, either in person or by representative, by filing an entry of appearance with the Secretary in accordance with section 201.11 of the Commission's rules (19 CFR § 201.11). Each entry of appearance must be filed with the Secretary no later than 21 days after the publication of this notice in the Federal Register.

The Secretary will compile a service list from the entries of appearance filed in these final investigations and from the Commission's record in the preliminary investigations. Any party submitting a document in connection with these investigations shall, in addition to complying with section 201.8 of the Commission's rules (19 CFR § 201.8), serve a copy of each such document on all other parties to the investigations. Such service shall conform with the requirements set forth in section 201.16(b) of the rules (19 CFR § 201.16(b)).

In addition to the foregoing, each document filed with the Commission in the course of these investigations must include a certificate of service setting forth the manner and date of such service. This certificate will be deemed proof of service of the document. Documents not accompanied by a certificate of service will not be accepted by the Secretary.

For further information concerning the conduct of the investigations, hearing procedures, and rules of general application, consult the Commission's Rules of Practice and Procedure, part 207, subparts A and C (19 CFR § 207, 44 F.R. 76457 as amended in 47 F.R. 6190 and 47 F.R. 12792) and part 201, subparts A through E (19 CFR § 201).

This notice is published pursuant to section 207.20 of the Commission's Rules of Practice and Procedure (19 CFR § 207.20).

By order of the Commission.

Issued: September 8, 1982.

KENNETH R. MASON,
Secretary.

Investigations Nos. 701-TA-99, 107, and 138 (Final)

CERTAIN CARBON STEEL PRODUCTS FROM THE NETHERLANDS AND THE UNITED KINGDOM

AGENCY: United States International Trade Commission.

ACTION: Termination of final countervailing duty investigations.

EFFECTIVE DATE: September 7, 1982.

SUMMARY: As a result of final negative countervailing duty determinations by the United States Department of Commerce involving certain carbon steel products from the Netherlands and the United Kingdom, the United States International Trade Commission hereby gives notice of the termination of the following investigations:

Hot-rolled carbon steel sheet and strip, provided for in TSUSA items 607.6610, 607.6700, 607.8320, 607.8342, and 607.9400 and 608.1920, 608.2120, and 608,2320, respectively, from the Netherlands (investigation No. 701-TA-99 (Final));

Cold-rolled carbon steel sheet, provided for in TSUSA items 607.8320 and 607.8344, from the Netherlands (investigation No. 701-TA-107 (Final)); and

Cold-formed carbon steel bar, provided for in TSUSA items 606.8805 and 606.8815, from the United Kingdom (investigation No. 701-TA-138 (Final)).

FOR FURTHER INFORMATION CONTACT: Mr. Robert Eninger (202-523-0312) or Mr. Daniel Leahy (202-523-1369), Office of Investigations, U.S. International Trade Commission.

This notice is published pursuant to section 207.20 of the Commission's Rules of Practice and Procedure (19 CFR § 207.20).

By order of the Commission.

Issued: September 8, 1982.

KENNETH R. MASON,
Secretary.

In the matter of CERTAIN TEXTILE SPINNING FRAMES AND AUTOMATIC DOFFERS THEREFOR	Investigation No. 337-TA-124

Scheduling of Briefs on Presiding Officer's Recommendation That Counsel Be Disqualified

AGENCY: U.S. International Trade Commission.

ACTION: Scheduling of briefs regarding presiding officer's recommendation.

Notice is hereby given that on August 30, 1982, the presiding officer recommended that the Commission grant complainant's motion (Motion No. 124-3) to disqualify counsel for respondents Machinenfabrik Rieter, A.G. and American Rieter Company, Inc. in investigation No. 337-TA-124, Certain Textile Spinning Frames and Automatic Doffers Therefor. The presiding officer's recommendation (Order No. 2) has been certified to the Commission for review. Interested persons may obtain copies of the presiding officer's recommendation (and all other public documents on the record of this investigation) by contacting the Office of the Secretary, U.S. International Trade Commission, 701 E Street, NW., Room 161, Washington, D.C. 20436; telephone: 202-523-0161.

BRIEFS: The Commission requests that the parties file briefs concerning the disqualification issue. Such briefs should be directed at the presiding officer's findings and recommendation. The parties are encouraged to address the following issues: (1) What is the relationship between the issues in the "Rockford" litigation and those of the present case? The brief should discuss with specificity how the patents, prior art, alleged anticompetitive conduct, etc., relate to the patent and injury issues of the Commission's investigation. (2) What is the relevance of the material allegedly reviewed by Rieter's counsel in the two earlier matters to the patent and injury issues of the present case? The brief should discuss, how, if at all, the categories of confidential information allegedly reviewed (e.g. sales figures, licensing policy, etc.) relate to the Commission's proceeding?

The original and 14 copies of all briefs shall be filed with the Commission's Office of the Secretary not later than September 8, 1982. The briefs shall be double-spaced and shall not exceed 20 pages in length. The record is limited to that compiled before the presiding officer and no additional evidence will be received.

FOR FURTHER INFORMATION CONTACT: Warren H. Maruyama, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202-523-0375.

By order of the Commission.

Issued: September 3, 1982.

KENNETH R. MASON,
Secretary.

In the matter of CERTAIN METHODS FOR EXTRUDING PLASTIC TUBING	Investigation 337-TA-110

Notice of Issuance of Exclusion Order

AGENCY: U.S. International Trade Commission.

ACTION: Issuance of exclusion order.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation to determine whether there is a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in connection with the importation or sale of certain extruded plastic tubing and reclosable plastic bags, and published notice thereof in the Federal Register of November 12, 1981 (46 F.R. 55797).

On August 3, 1982, the Commission unanimously determined that there is a violation of section 337 in the unauthorized importation and sale of certain extruded plastic tubing and reclosable plastic bags which are the product of a process which, if practiced in the United States, would infringe certain claims of U.S. Letters Patents Re. 26,991, Re. 28,950, and/or Re. 29,208. The Commission further determined that the appropriate remedy is an order directing that the articles in question be excluded from entry into the United States.

Copies of the Commission's Action and Order, the Commission's opinion, and all other public documents on the record of the investigation are available for inspection by the public during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Room 161, Washington, D.C. 20436, telephone 202-523-0161.

FOR FURTHER INFORMATION CONTACT: Eliza Patterson, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202-523-0359.

By order of the Commission.

Issued: September 2, 1982.

KENNETH R. MASON,
Secretary.

In the matter of CERTAIN SKATEBOARDS AND PLATFORMS THEREFOR	Investigation No. 337-TA-37

Notice of Dissolution of Exclusion Order

AGENCY: U.S. International Trade Commission.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to dissolve the exclusion order issued in October 1980 in connection with the above-captioned investigation.

SUPPLEMENTARY INFORMATION: On October 9, 1980, the Commission issued an order excluding the importation into the United States of skateboards and platforms therefor which infringe claims 1, 2, 7, or 8 of U.S. Letters Patent 3,565,454 (hereinafter the '454 patent) for the remaining term of the patent except under license.

On July 27, 1981, the United States Court of Appeals for the Ninth Circuit affirmed a lower court decision holding the '454 patent invalid as obvious under 35 U.S.C. § 103. *Stevenson v. Grentec, Inc.*, 652 F.2d 20 (9th Cir. 1981). On April 26, 1982, the U.S. Supreme Court denied a petition for review of the Grentec decision. *Stevenson v. Grentec, Inc.*, No. 81-1185, cert. denied April 26, 1982 (50 U.S.L.W. 3854, Apr. 27, 1982). As a result of these decisions, the '454 patent is invalid and unenforceable.

Copies of the Commission's Action and Order and all other nonconfidential documents filed in connection with this investigation are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436; telephone 202-523-0161.

FOR FURTHER INFORMATION CONTACT: N. Tim Yaworski, Assistant General Counsel, Office of the General Counsel, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436; telephone 202-523-0311.

By order of the Commission.

Issued: August 27, 1982.

KENNETH R. MASON,
Secretary.

In the matter of CERTAIN TEXTILE SPINNING FRAMES AND AUTOMATIC DOFFERS THEREFOR	Investigation No. 337-TA-124

Notice of Prehearing Conference and Hearing

Notice is hereby given that a prehearing conference will be held in this case at 9:00 a.m. on September 27, 1982, in the Waterfront Center, Room 201, 1010 Wisconsin Avenue, N.W., Washington, D.C., and the hearing will commence immediately thereafter.

The purpose of the prehearing conference is to review the trial memoranda submitted by the parties, to stipulate exhibits into the record, and to discuss any questions raised by the parties relating to the hearing.

The Secretary shall publish this notice in the Federal Register.

Issued: August 27, 1982.

JANET D. SAXON,
Administrative Law Judge.

In the matter of CERTAIN TEXTILE SPINNING FRAMES AND AUTOMATIC DOFFERS THEREFOR	Investigation No. 337-TA-124

Notice Concerning Procedure for Submission of Information on Public Interest Factors

Notice is hereby given that oral presentations concerning remedy, bonding, and the public interest considerations, factors the Commission is to consider in the event it determines relief should be granted, will be heard beginning at 9:00 a.m. on September 30, 1982, in Room 201, Waterfront Center, 1010 Wisconsin Avenue, N.W., Washington, D.C. 20007. Written submissions on these questions may be submitted at any time until that date.

If oral presentations are made, participants will have the option of presenting the statement of a witness under oath, subject to cross-examination, or making an oral statement of position, not under oath, and not subject to cross-examination.

In the oral presentations all parties, interested persons, and government agencies will be limited in their presentations to no more than 15 minutes, not including cross-examination. Each participant will be permitted an additional 5 minutes for closing arguments after all oral presentations have been concluded.

Requests for permission to make oral presentations of positions should be filed, in writing to the Secretary of the Commission at his office in Washington no later than close of business, September 23, 1982.

The Secretary shall publish this notice in the Federal Register.

Issued: August 26, 1982.

JANET D. SAXON,
Administrative Law Judge.

Index

U.S. Customs Service

Customs Service Decisions

U. S. GOVERNMENT PRINTING OFFICE : 1982 O - 385-177